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Nos. 07-21, 07-25

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IN THE

Supreme Court of the United States

No. 07-21

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF STATE RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person show government-issued photo identification violates the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS

In No. 07-21, Petitioners include State Representative William Crawford (D-Indianapolis) and Township Trustee Joseph Simpson (D-Indianapolis), along with several non-profit political-interest groups, including United Senior Action of Indiana, Indianapolis Resource Center for Independent Living ("IRCIL"), Concerned Clergy of Indianapolis ("CCI"), Indiana Coalition on Housing and Homeless Issues (joined in the Petition, but has now withdrawn from the case), and the Indianapolis Branch of the NAACP. The Respondents are the defendant Marion County Election Board ("MCEB") and intervenor-defendant the State of Indiana.

In No. 07-25, Petitioners are the Indiana Democratic Party and the Marion County Democratic Central Committee ("MCDCC"). Respondents are Indiana Secretary of State Todd Rokita, Indiana Election Division Co-Directors J. Bradley King and Pamela Potesta, and the MCEB.

This brief is submitted on behalf of the State Respondents, *i.e.*, the State of Indiana, Indiana Secretary of State Rokita, and Indiana Election Division Co-Directors King and Potesta.

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STATEMENT OF THE CASE

Indiana requires citizens voting in-person on election day, or casting a ballot in-person at a county clerk's office prior to election day, to present photo identification issued by the United States or the State of Indiana. Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1 ("Voter ID Law" or "Law"). The identification must bear an expiration date that either has not yet occurred or occurred after the date of the most recent general election. Ind. Code § 3-5-2-40.5(3). The Law does not apply to voters receiving and casting absentee ballots by mail, or to those who vote "in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(c), 3-11-10-1.2. Indigents and religious objectors may cast provisional ballots and have until noon 10 days after election day to validate them by affidavit at the county clerk's office. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c).

I. Historical Context for the Voter ID Law

Two historical developments place the Indiana Voter ID Law into proper context: the relatively recent election-modernization movement (which is based in part on national reports of in-person voter fraud), and a long developing problem of voter-list inflation.

1. In *Bush v. Gore*, 531 U.S. 98, 104 (2000), the Court expressed hope that "legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting." The 2000 Florida controversy prompted calls for election

reform of all types, including not only voting machines, but also recount standards, registration rules, provisional-ballot requirements, and voter-identification regulations. *See* Andrew Gumbel, *Steal this Vote: Dirty Elections & the Rotten History of Democracy in America* 325 (2005). Analysts have repeatedly criticized States' election procedures as hopelessly antiquated, inefficient, and vulnerable to manipulation. *Ind. Democratic Party v. Rokita*, No. 1:05-CV-634-SEB-VSS, Docket No. 82, Ex. 6, at 15 (S.D. Ind. Dec. 1, 2005) [hereinafter "State S.J.Br."] (study by Lori Minnite and David Callahan). Former President Jimmy Carter has said that the Carter Center would "never agree to monitor an election" in the United States because "'[t]he American political system wouldn't measure up to any sort of international standards . . . .'" Gumbel, *supra*, at 1.

At the same time, credible nationwide reports of voter-impersonation fraud have been frequent. Since October 2002, the U.S. Department of Justice has launched more than 180 investigations into election fraud, some of which have resulted in charges for multiple voting. State S.J.Br. Ex. 2, at 2. Reports of decedent votes emanate from many States. State S.J.Br. Exs. 4, 11-15. In November 2000, the Atlanta Journal-Constitution reported that since 1980, 5,412 votes had been cast in the name of decedents in Georgia. State S.J.Br. Ex. 12, at 1. In St. Louis, 14 dead people reportedly voted in 2000. John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* 64 (2004).

In Washington's 2004 gubernatorial elections, where the margin of victory was 129 votes, the tally

included more than 1,600 fraudulently cast ballots, including 19 decedent votes, six double votes, and 77 votes unaccounted for on the registration rolls. State S.J.Br. Ex. 3, at 4-5, 19. In Wisconsin, a multi-jurisdictional investigation after the 2004 elections documented more than 100 double votes under fake names and addresses. State S.J.Br. Ex. 4, at 2. In that election, utility bills sufficed for same-day-registrant identification, Wis. Stat. § 6.55(7)(c)(12) (2005) (repealed 2006), and ballots cast exceeded registrations by 4,609, nearly 2% of the total votes. *Id.* at 5.

Records suggest that 300 Missouri voters may have voted twice in the 2000 and 2002 elections. State S.J.Br. Ex. 8, at 1. An official investigation of only two Missouri counties following the 2000 election revealed over 1,000 fraudulent ballots, including at least 68 multiple votes, 14 decedent votes, and 79 vacant-lot votes. State S.J.Br. Ex. 6, at 43; Ex. 7, at 3-6. Residents near the Missouri-Kansas border have voted in both States. *United States v. Jones*, No. 05-CR-00257 (W.D. Mo. 2005); *United States v. Martin*, No. 05-CR-00258 (W.D. Mo. 2005); *United States v. Scherzer*, No. 04-CR-00401 (W.D. Mo. 2004); *United States v. Goodrich*, No. 04-CR-00402 (W.D. Mo. 2004); *United States v. McIntosh*, No. 04-CR-20142 (D. Kan. 2004). In 2004, 235 ballots were cast in the names of decedents in Missouri. Matt Wynn, *Deceased Still on State's Voting Rolls*, Columbia Missourian, Nov. 2, 2006.

In Indiana, the Supreme Court invalidated the 2003 East Chicago mayoral primary based on evidence of rampant absentee-ballot fraud. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1154 (Ind. 2004). The

Lake County Vote Fraud Task Force has notched 37 convictions for various types of fraud, including voting in the wrong precinct and mishandling absentee ballots. *Vote Fraud Task Force Claims Three More*, Merrillville Post-Trib., Nov. 9, 2007, at A6. Reports of vote fraud have arisen elsewhere in the State as well. U.S. Election Assistance Comm'n, *EAC Voting Fraud—Voter Intimidation Preliminary Research—Absentee*, at 82 (reporting accusations of vote fraud in Marion, Porter, and Madison counties); *Machine Problems, Ballot Probe Mar Voting in Indiana Counties*, AP Alert, Nov. 8, 2006 (discussing FBI investigation of possible ballot tampering in Monroe County). While these investigations have not yet yielded convictions for impostor voting, they evidence a political culture where political bosses resort to fraud to sway elections.

In response to the developing national concern over antiquated voting systems and reports of election fraud, Congress enacted the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) ("HAVA"). HAVA provides funds for statewide voter-registration systems, computer-based voting technology, voter education, and poll-worker training. 42 U.S.C. § 15301(b). HAVA requires States to afford anyone whose right to vote is challenged the opportunity to cast a provisional ballot. 42 U.S.C. § 15482(a). It also requires first-time voters who register by mail without proof of identification to present identification either to the county voter-registration office or at the polls. 42 U.S.C. § 15483(b); *see also* 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) ("By passage of this legislation, Congress has made a statement that vote fraud exists in this country.").

Following national trends, the Indiana legislature has enacted many election-modernization reforms. In 2001, it funded new voting systems, Ind. Code § 3-11-6.5-2, and authorized satellite absentee-voting precincts. Ind. Code § 3-11-10-26.3. In 2002, Indiana required a voters' bill of rights to be posted in every precinct. Ind. Code §§ 3-5-2-50.4, 3-5-8 *et seq.* In 2005, the General Assembly not only enacted the Voter ID Law, but also placed new restrictions on absentee voting and handling absentee ballots. Ind. Code §§ 3-11-4-2, 3-11-10-24(c)-(d). It also eliminated the use of outdated lever and punch card voting systems. Ind. H. Enrolled Act No. 1407, §§ 145-46, Ind. Pub. L. No. 221-2005 (repealing Ind. Code §§ 3-12-2.5-1 to 3-12-2.5-10). In 2006, the General Assembly enacted a "vote center" pilot program. Ind. Code § 3-11-18 *et seq.*

Cheering along the election-modernization movement, in September 2005, a commission chaired by former President Carter and former Secretary of State James A. Baker, III, issued a report that recommended many election reforms. Comm'n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* (Sept. 2005) [hereinafter "Carter-Baker Report"]. It suggested, for example, that States create universal, interconnected voter-registration systems and experiment with vote centers. *Id.* at 10-15, 36. The Commission also addressed in-person vote fraud, emphasizing that "there is no doubt that it occurs." J.A. 138. The Commission recommended requiring photo identification at the polls to deter fraud. J.A. 138-40.

2. The second relevant historical trend concerns the inflation of Indiana's voter-registration lists in

the wake of the National Voter Registration Act, widely known as "Motor-Voter," a development that has created opportunities for election fraud.

Enacted in 1993, Motor-Voter has had a dramatic impact on voter-registration rolls. Its signature accomplishment was to require States to provide voter registration at various government locations, principally license branches but also state welfare offices. 42 U.S.C. §§ 1973gg-3, 1973gg-5.

An unintended negative effect, however, has been to inflate voter lists with millions of invalid registrations. J.A. 166 (discussing the "burgeoning of the voter registration lists across the nation"). Motor-Voter significantly restricts how States keep their voter-registration lists accurate by requiring several steps to confirm addresses before cancelling obsolete registrations. States satisfy this duty by sending notices to individuals identified by the U.S. Postal Service as having completed change-of-address cards. 42 U.S.C. § 1973gg-6(c). The notice advises the voter either to return the card or vote in one of the next two general elections to avoid being purged. 42 U.S.C. § 1973gg-6(d).

The result is substantial list inflation. State S.J.Br. Ex. 26. In both 2000 and 2004, numerous States actually recorded registration rates over 100% of voting-age population ("VAP"). *Id.* at 1. Between 1992 and 2004, the percentage of nationwide VAP registered to vote skyrocketed from 75.87% to 86.84%. *Id.*

In Indiana, this problem hit home in 2000, when the Indianapolis Star found more than 300 decedent

registrations. J.A. 147. The State's expert in this case compared actual Indiana voter registrations with self-reported registrations and estimated Indiana's list inflation to be 41.4%, among the highest in the nation. J.A. 177-78, 184.

Indiana's voter-list maintenance efforts were further hampered by partisan gridlock within state government over how to conduct voter-list maintenance. After a Department of Justice lawsuit in 2006, the State signed a Consent Decree requiring specific voter-list-maintenance programs, including a statewide address-confirmation mailing to all voters. J.A. 299-307. The Indiana Election Division has sent more than 700,000 mailings to identify potentially invalid registrations and has forwarded the results to county registration offices. None of these "inactive" registrations, however, can be cancelled until after the 2008 general election. Until then, both legitimate voters and impostors can save them from cancellation by using them to vote. Moreover, the State cannot cancel any registrations, only county voter-registration offices (who are not party to the Consent Decree) can do so. Ind. Code §§ 3-7-38.2-2, 3-7-38.2-15, 3-7-43-1, 3-7-45-3.

II. Evidence of the Impact of the Voter ID Law

None of the Petitioners in this case is a registered voter who cannot vote because of the Voter ID Law. Pet.App. 5, 47-58, 101-03. Nor could Petitioners identify even one member or constituent who cannot vote because of the Law. Pet.App. 5, 101-03.

The Democrats, however, attempted to prove that the Law would have a disparate negative impact

based on the race, education, and income of voters. Kimball Brace compared Marion County, Indiana's voter-registration list with demographic information of individuals from Marion County to whom the Indiana Bureau of Motor Vehicles ("BMV") had issued photo identification. Pet.App. 60-73. Brace, however, could not generate any reliable data showing that minorities, low-income, or low-education residents are disproportionately less likely to have photo identification. J.A. 279-80; Pet.App. 67-68, 70-71. The district court rejected Brace's study, but also observed that Brace's own disparate-impact-skewed data showed that 99% of the Indiana VAP already had some form of state-issued photo identification. Pet.App. 61, 69. Meanwhile, only 66.8% of Indiana's VAP reported being registered to vote in 2004. J.A. 177.

The only published study of Indiana voter turnout since implementation of the Voter ID Law shows *no* negative disparate impact on the groups studied by Brace. In his November 2007 study, Jeffrey Milyo of the Truman School of Public Affairs at the University of Missouri reports that "[o]verall, voter turnout in Indiana *increased* about two percentage points" after photo identification. Jeffrey Milyo, Inst. of Pub. Policy, Report No. 10-2007, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, at 1 (Nov. 2007) (emphasis added) [hereinafter "Milyo Study"]. Furthermore, "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties." *Id.* at Abstract. Milyo concludes: "The only consistent and frequently significant effect

of voter ID that I find is a positive effect on turnout in counties with a greater percentage of Democrat-leaning voters." *Id.* at 1.

SUMMARY OF THE ARGUMENT

The Indiana Voter ID Law establishes reasonable, long-overdue election-security reform in a State highly vulnerable to in-person election fraud. It represents one among many attempts by Indiana, other States, and Congress to modernize dysfunctional voting practices. Far from being a novel, partisan, voter-suppression gimmick, the Voter ID Law is a mainstream outgrowth of the election-modernization movement. Given both this utterly benign historical context and Petitioners' impassioned accusations of discrimination, perhaps the most instructive fact about this case is that none of the Petitioners has identified even one member or constituent unable to vote because of the Voter ID Law. This resounding failure defeats Petitioners' case for unconstitutionality at every level.

I. First, the lack of any injured voters thrusts substantial Article III standing questions to the fore. Petitioners are two units of the Democratic Party, two candidates, and a collection of political-interest groups. The Democratic Party units and the political-interest groups have no voting rights of their own to assert, and Candidates Crawford and Simpson already have photo identification. All Petitioners (1) claim novel injury to themselves, and (2) assert the right to litigate in the name of supposedly injured "members" or constituents.

a. The Indiana Democratic Party claims injury by virtue of expending resources to help others comply with the Law. It has not, however, shown that the Voter ID Law frustrates any specific objectives of the Party, and it identifies no statutory or constitutional right of its own that the Law impinges, so its expenditure of resources is insufficient.

Nor have candidates Crawford and Simpson alleged cognizable injury to themselves, either as voters or as candidates. Both claim offense at having to show identification at the polls, but mere offense is not Article III injury. Furthermore, the Voter ID Law does not regulate Crawford and Simpson as candidates, and they have identified no injured supporters, so they may not assert *jus tertii* standing.

b. To invoke associational standing, an organization must prove it has members who suffer direct injury. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An inherently critical safeguard is that the association be accountable to the members it claims to represent. The Indiana Democratic Party and at least two of the political-interest groups, however, have no real "members" (or the substantial equivalent) to whom they are accountable. Further, all plaintiff organizations have unilaterally declared the right to sue on behalf of unidentified, hypothetical supporters supposedly injured by the Law. This is insufficient under Article III, which requires proof of the existence of injured members.

II. Second, the lack of any actual injured voters conclusively refutes Petitioners' "severe burden" theory and underscores the Law's narrow tailoring. How onerous can the Law be if a major political party, two seasoned candidates, and four substantial political-interest groups cannot find even one person injured by it?

The Voter ID Law is unlike other election regulations that the Court has subjected to strict scrutiny, such as poll taxes, durational residency requirements, and property-ownership qualifications. The Court has expressly distinguished between such substantive voter qualifications and benign procedural safeguards, such as advance-registration requirements. The former were suspect because the State totally denied the franchise to an entire class of residents that had no way to gain eligibility to vote. The latter, in contrast, merely establish reasonable election protocols and afford citizens ample opportunity to ensure their own ability to vote. Like voter registration, the Voter ID Law provides procedural protection of election integrity and is not subject to strict scrutiny. At most, it is subject to relatively mild review that balances the State's compelling interest in preventing election fraud against the minor burdens imposed by the Law.

Much of Petitioners' argument for strict scrutiny turns on the theory that the Law discriminates against a host of groups, including minorities, the poor, the elderly, non-drivers, urban residents, and Democrats. No evidence supports these assertions, and Petitioners' own submissions refute them. First, there is no allegation or proof of purposeful

discrimination. Second, Kimball Brace found—even with data skewed in favor of the Democrats—no likely negative disparate impact on minorities or low-income citizens. Instead, Brace's data established that 99% of Indiana's VAP already possess photo identification, which alone renders untenable any theory of discrimination and proves the insignificance of any burdens the Law imposes.

Furthermore, a recent academic review of voter turnout in Indiana before and after the Law became effective—the only study of its kind—shows *zero* negative disparate impact on minorities, the poor, and the elderly. It also shows a statistically significant *positive* disparate impact in counties with high concentrations of Democrats. Meanwhile, the Petitioners' own extra-record studies do not suggest negative disparate impact on minorities or other vulnerable demographic groups. As implied by the extraordinarily large majority public support the Law enjoys, there is no political discrimination at work here.

III. The Voter ID Law is a legitimate and reasonable fraud deterrent. It is just one part of a larger effort to modernize elections, and it responds both to growing concerns about election fraud and to Indiana's highly inflated voter-registration lists, which invite fraud. The State bears no burden of proving the need for fraud-prevention measures, but if necessary, its evidence of voter-list inflation and reports of fraud locally and nationally more than suffice. Further, the Law increases public confidence in the integrity of Indiana's elections.

Finally, Indiana's Voter ID Law contains several safeguards to accommodate the 1% of VAP allegedly without government-issued photo identification. The BMV must issue non-license photo identification free to voters who need it. Voters who arrive at the polls without identification may cast a provisional ballot and validate it within 10 days at the county clerk's office—far more time than the 48 hours recommended by the Carter-Baker Commission. Indigents who must pay a fee to obtain identification (such as for a birth certificate) and religious objectors may cast provisional ballots and validate them without identification. The Law does not apply to mail-in absentee ballots, so the elderly and disabled will not need photo identification.

On this record, there can be but one conclusion: the State's compelling interest in preventing fraud through the Voter ID Law outweighs the minimal burdens the Law imposes on the right to vote. Not only that, but even if strict scrutiny applies, the State has proven a compelling need for the Law and sufficient narrow tailoring for the Law to survive.

ARGUMENT

I. Article III Standing Collapses Because No Plaintiff Has Identified Even One Person Unable to Vote Because of the Voter ID Law

The Court must ensure Article III jurisdiction in every case, even if the issue is not explicitly included in the question presented. *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S.Ct. 1854, 1860 (2006). Here, standing fails because no Petitioner suffers injury-in-fact or represents anyone unable to vote because of the Voter ID Law.

A. No Plaintiff suffers cognizable direct injuries

1. The Democrats claim injury from the Voter ID Law because the Party expends resources to help supporters comply with the Law. Dem.Br. 56-57 (citing *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). In *Metro. Washington*, however, the plaintiff did not merely expend resources in response to changes it did not like; it identified a specific objective (less airport noise) that the defendants' threatened action (more airport traffic) self-evidently contravened. *Metro. Wash.*, 501 U.S. at 264-65. The Democrats have not identified any specific objective that the Voter ID Law inherently or empirically frustrates; indeed, the available evidence suggests the party benefits from the Law. *See* Part II.B.2, *infra*.

In *Havens*, an organization sued to vindicate a right statutorily guaranteed to "all" persons that the defendant denied it. *Id.* at 376 n.16. Here, no statute grants any organization a right to defend. There is no "right" for a group to exist free of the possibility that a new law might alter its spending priorities.

2. Candidates Crawford and Simpson have claimed injury to themselves as voters and as candidates. As voters, Crawford and Simpson claim only to be "offended" by having to show identification at the polls. J.A. 73-74, 82-83. Mere offense, however, is not cognizable Article III injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

As candidates, Crawford and Simpson claim to represent the rights of hypothetical supporters who would vote for them but for the Voter ID Law. Pet.App. 84; *Powers v. Ohio*, 499 U.S. 400, 411 (1991). They have not, however, identified any such supporters, Pet.App. 84-85, so they have not proved even this attenuated injury. Moreover, to assert *jus tertii* standing as candidates, Crawford and Simpson must show that they are *regulated* as candidates, which they are not. They are regulated as voters, but have no special relationship in that capacity to other voters.

The district court's theory of representational standing on behalf of voters who inadvertently fail to bring identification to the polls cannot work either. Pet.App. 85. Crawford and Simpson have no basis for *jus tertii* standing, period. And any hypothetical voter who forgets to bring identification to the polls can vote provisionally and then validate the ballot by

bringing identification to the clerk's office within ten days of the election. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c). There is no potentially unredressable on-the-spot injury that justifies representation of forgetful voters in this lawsuit.

B. Without identifying injured members, neither the Democrats nor the other political-interest groups can assert associational standing

Associations may assert the rights of members only if they identify at least one who is genuinely injured. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). None of the groups has met that burden.

1. The Democrats tried and failed to identify members injured by the Law

Both the Indiana Democratic Party and the MCDCC claim "associational standing to sue on behalf of their affected members, citizens who support the Democratic Party and its purposes but lack the mandated photo ID." Dem.Br. 58. In discovery, the MCDCC identified four members, but also acknowledged that none was injured by the Law. J.A. 197-98, 203-04. The MCDCC, therefore, does not have associational standing.

The Indiana Democratic Party has no "members" in the traditional sense. Its bylaws provide that "[a]ny legally qualified Indiana voter who supports the purposes of the Party may be a member," J.A. 194, but do not explain how to become a member or

quit being a member. Organizations can only assert the rights of members who have some capacity to control the organization, even if only by disassociating. *Hunt*, 432 U.S. at 343-44. Accountability is critical for associational standing, and the Indiana Democratic Party lacks it.

In Indiana, one does not register as a member of a political party. At primaries, citizens vote the ballot of whichever party they wish, Ind. Code § 3-10-1-6, so voting in a primary is not a meaningful signal of "membership." There is a nominal requirement that a voter either have voted for a majority of the party's candidates at the last general election or pledge to support a majority of the party's candidates in the coming general election, Ind. Code § 3-10-1-6, but that law is not practically enforceable. *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224-25 (1986) (invalidating law closing party primary to independents). Voters may participate in a party's primary for many reasons, the least of which may be to actuate membership, much less to give consent to representation in a lawsuit. Besides, even if voting in a primary gave some indication of membership, there is no way to quit, as the Democrats' own supposedly injured "members" confirmed. J.A. 209 (Deposition of David Harrison) (asked how one might leave the Democratic Party: "He doesn't. Once a Democrat, always a Democrat."); J.A. 217 (Deposition of Constance Andrews) (asked how she might leave the Democratic Party: "I guess when I die.").

The Indiana Democratic Party has never put forth a realistic theory as to who constitutes a "member." It claims to represent all who have ever

voted for a Democrat or might do so in the future. The doctrine of associational standing, however, depends on *voluntary* association. *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) (associations are groups of individuals who "band together"). Voting for a Democrat does not constitute volunteering to have one's interests represented in this lawsuit. The essential requirement that those represented have collective control over the case is missing.

Regardless, the Democrats have not identified any putative members injured by the Voter ID Law. Each supporter they identified as injured either has photo identification or is entitled to vote absentee without it. Pet.App. 80-82. Without proof of injured members, the Party has no associational standing. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Nor may the Democrats assert the rights of hypothetical voters who through happenstance fail to bring identification to the polls. Pet.App. 78-79; Dem.Br. 59-60. There is no Article III doctrine permitting an association to hypothesize rather than to prove the injuries to members that it claims to vindicate. Besides, voters stymied at the polls by happenstance have a provisional-ballot remedy. Ind. Code § 3-11.7-5-2.5.

2. The political-interest groups also failed to identify any members injured by the Law

The political-interest groups have also failed to identify any legitimate members injured by the Voter ID Law. Like the Democrats, Plaintiffs IRCIL and CCI unilaterally designate "members" and then

presume to litigate on their behalf. IRCIL's bylaws proclaim that its "members" include "the people with disabilities whom we serve," but nowhere provide those "members" any means of disassociating. J.A. 42. Similarly, CCI alleges that its members include "poor persons" in the City of Indianapolis, but provides no exit from membership. J.A. 62, 65.

Further, none of the political-interest groups identified any "members" adversely affected by the Voter ID Law. J.A. 22, 28, 43, 47-48, 51, 63-64. The groups have vaguely alluded to unidentified persons who *might* be injured, but that is not enough. *Hunt*, 432 U.S. at 343-44.

II. The Balancing Test for Non-Discriminatory Laws Protecting Election Integrity Applies Here

Even if the Court somehow finds Article III standing, the lack of any injured voters conclusively demonstrates the absence of any "severe burden" and the manifest reasonableness of the Voter ID Law.

The Elections Clause, U.S. Const. art. I, § 4, provides the basic framework for analysis.[1] On one hand, it embraces the authority of States to enact comprehensive election regulations "not only as to times and places, but in relation to . . . prevention of

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[1] The Elections Clause, in conjunction with Article I, § 2 and Article II, § 1, is the font of the constitutional right to vote, a right later reinforced by Amendments I, XIV, XV, XVII, XIX, XXIII, XXIV, and XXVI. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).

fraud and corrupt practices" so as to "enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."). On the other hand, it grants Congress superseding authority to "make or alter" federal election regulations "at any time." U.S. Const. art. I, § 4, cl. 1. The Elections Clause signifies that discretionary legislative authority over elections is important because no "election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country." The Federalist No. 59, at 384 (Alexander Hamilton) (Modern Library Coll. ed. 1937).

All States have enacted complex election laws, each provision of which "will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Indeed, "[e]ach provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Even so, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

The Voter ID Law represents a reasonable, non-discriminatory exercise of Elections Clause authority

that, just as the Founders envisioned, takes account of "change in the situation of the country" and advances the agenda of election modernization. Federalist No. 59, *supra*, at 384. It does not establish any new criteria for voting, but instead provides a reasonable method of verifying voter identity—a fundamental, pre-existing voter-eligibility criterion. The Voter ID Law protects the franchise by ensuring that those who meet substantive eligibility requirements have their votes counted at full strength, undiluted by ineligible voters. *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7 (2006) (per curiam) (recognizing that voter-identification laws "prevent[] voter fraud" and consequent "'debasement or dilution of the weight of a citizen's vote'").

A. The Voter ID Law does not impose a "severe burden" on the right to vote

The Court has long rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick*, 504 U.S. at 432. Otherwise, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* at 433; *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens . . . severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.").

A voting regulation is subject to strict scrutiny only if it imposes a "severe burden" on the right to vote. *Burdick*, 504 U.S. at 434. Otherwise, it is valid so long as, balanced against "the character and magnitude of the asserted injury," it reasonably vindicates important state interests in electoral integrity. *Id.* (internal quotations omitted). Moreover, "voting-rights laws" are treated the same as "ballot-access laws." The Court has observed that its precedents "minimize[] the extent to which voting rights cases are distinguishable from ballot access cases . . . the rights of voters and the rights of candidates do not lend themselves to neat separation." *Id.* at 438 (internal quotations omitted). That is, ballot-access restrictions infringe some voters' rights no less than other voting laws. *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *see also Anderson*, 460 U.S. at 788.

1. The Court does not apply strict scrutiny to laws that merely regulate voting procedures in an evenhanded way. In *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973), the Court upheld a "lengthy" enrollment deadline for voting in a party's primary as "tied to a particularized legitimate purpose" and "in no sense invidious or arbitrary." The Court has similarly upheld advance voter registration because "States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds." *Marston v. Lewis*, 410 U.S. 679, 680 (1973).

In *Rosario*, moreover, the Court expressly distinguished between inherently suspect voter-qualification laws—laws disenfranchising soldiers,

creating special electorates, and imposing durational residency requirements—and benign fraud-prevention procedures. *Rosario*, 410 U.S. at 757. *Voter-qualification* laws have been problematic because those laws "totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Id.* at 757. But with *procedural* rules, responsibility lies with *voters*: "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment." *Id.* at 758.

This distinction between laws that affect voter qualifications and those that merely regulate election procedure has its roots with the Founders. Alexander Hamilton, discussing the Elections Clause, distinguished between "[t]he qualifications of the persons who may choose," which are "defined and fixed in the Constitution, and are unalterable by the legislature," and authority over "the *manner* of elections," where States have primacy. The Federalist No. 60, at 394 (Alexander Hamilton) (Modern Library Coll. ed. 1937).

The Voter ID Law is a procedural anti-fraud device affecting only the *manner* of elections, in no way comparable to voter-qualification laws the Court has subjected to strict scrutiny. The Law vindicates the very premise of voter-registration by protecting the right to vote at full value. It interposes minimal, if any, interference with legitimate voters, making strict scrutiny inappropriate.

2. Perhaps the most potent evidence rebutting the Petitioners' "severe burden" theory is their failure to identify *even one* eligible voter unable to vote because of the Law. As the district court found, "[d]espite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting" by the Voter ID Law. Pet.App. 101.

Nor is this case unusual in this regard. The same thing has happened in challenges to similar photo-identification requirements around the country. *See, e.g., Common Cause/Ga. v. Billups*, 504 F.Supp.2d 1333, 1372-74, 1380 (N.D. Ga. 2007) (rejecting the "severe-burden" theory because lack of injured voters "provides significant support for a conclusion that the Photo ID requirement does not unduly burden the right to vote"); *see also Gonzalez v. Arizona*, 2006 WL 3627297, at *7 (D. Ariz. 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007) (rejecting severe-burden argument because plaintiffs identified no one who "wish[ed] to vote but [was] *actually* unable to obtain identification"); *ACLU of N.M. v. Santillanes*, 506 F.Supp.2d 598, 623 (D.N.M. 2007) ("Plaintiffs have not identified a single voter who has been denied the right to vote based on the photo ID requirement."); *Perdue v. Lake*, 647 S.E.2d 6, 7-8 (Ga. 2007) (dismissing challenge because plaintiff had photo identification).

3. Furthermore, the data supplied by the Democrats' expert witness, Kimball Brace, disproves any "severe burden." Brace attempted to prove the Voter ID Law would have a disproportionate negative impact on the poor, the elderly, and

minorities, but the district court rejected his study as "utterly incredible and unreliable." Pet.App. 60. Yet the district court also noted that, "[t]o the extent that the Brace report reveals anything relevant, it is limited to the fact that the vast majority, which is to say up to 99%, of Indiana's [VAP] already possess an Indiana driver's license or an identification card." Pet.App. 104.

Petitioners agree with this estimate of 99% pre-enforcement compliance, Dem.Br. 12; ACLU Br. 12, but then proceed as if the entire remaining 1% will necessarily be burdened by the Law. They do not, however, show that *any* of these estimated 43,000 individuals (1) are registered to vote;[2] and (2) would like to vote; but (3) will be unable to vote because of the Voter ID Law.

This is a significant omission because, as of 2004, only 66.8% of Indiana's VAP reported being registered to vote, and only 57.3% reported voting. J.A. 177. Applying the latter percentage straightforwardly to the 43,000 individuals supposedly without identification leaves less than 25,000 voters—0.5% of Indiana's 2004 VAP of 4,592,000 (J.A. 180)—who are even in a position conceivably to suffer a negative impact from the Voter ID Law. And many of those will vote absentee without need for identification. J.A. 170 (noting 10.4% absentee-voting rate in 2004, but not distinguishing mail-in absentee ballots from "absentee" ballots cast at the county clerk's office

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[2] Brace attempted, but failed, to relate BMV records to registered voters, Pet.App. 60-73, and Petitioners no longer appear to rely on this data.

where identification is required, Ind. Code § 3-11-10-26(b)(2)).

If immediate ability to vote is the measurement of the "severity" of a voting law, the Voter ID Law is far less burdensome than Indiana's voter-registration law. Even assuming (unrealistically) that the Voter ID Law prevents all 43,000 citizens who supposedly lack photo identification from voting, by parity of logic, Indiana's voter-registration law prevents over *1.5 million* individuals from voting, which is 33.2% of 2004 VAP. J.A. 180. This represents *35 times* more "severity" than the Voter ID Law. Yet, presumably, no one would argue that voter-registration laws impose a "severe burden" on voting.

4. As for the hypothetical, minuscule percentage of voters who must yet procure government-issued photo identification to be able to vote in-person, Petitioners unfairly atomize each step of the process to make it appear an impossible task. Dem.Br. 12-16; ACLU Br. 14-19. They stress the difficulty of acquiring a birth certificate,[3] secondary document, and proof of address,[4] and the need to travel to the

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[3] Voters born in Indiana may procure a birth certificate from the Indiana Department of Health using many forms of non-photo identification, including a voter-registration card. Dem. S.J.Br. Ex. 7. Local officials "shall issue a certification" of an applicant's own birth registration and need require only one unspecified "form of identification." Ind. Code § 16-37-1-8(a)(3). Refusal to issue a birth certificate is subject to judicial review. Ind. Code § 16-37-1-8(b).

[4] A voter-registration card constitutes proof of address, 140 Ind. Admin. Code § 7-4-3(e)(7), so any homeless

BMV, ignoring the fact that voters without identification need only gather these documents *once* and need not wait until *after* casting a provisional ballot to do so. The way Petitioners describe the process, it is a wonder any Indiana citizens are licensed to drive, let alone able to vote. Yet 99% of Indiana's VAP has managed to accomplish this supposedly arduous task.

Indeed, any inconvenience here is certainly no greater than for registration and in-person voting, which are unquestionably constitutional. To register, a poor, uneducated would-be voter must first investigate *how* to register, which may require a trip to a library (assuming no residential internet access). There, the citizen must either locate a registration form or travel to another agency, such as the BMV or the clerk's office (the very same supposedly hard-to-reach destinations for procuring identification or validating a provisional ballot). The citizen then must complete the application, which has no fewer than 16 questions and half a page of instructions, and mail or submit it in time for the county registration office to receive it no later than 29 days before the election. Ind. Code § 3-7-13-11. The voter must then locate the proper precinct, arrange transportation on election day, possibly pay to park, and perhaps stand in a long line before voting. The effort and expense may exceed the wherewithal of many uneducated, poor, and elderly

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person, if properly registered to vote, can acquire identification. *Cf.* Ind. Code § 3-7-33-5(b)-(e) (requiring eligibility notice to all voter-registration applicants at "the mailing address provided in the application" and requiring denial of the application if the notice is returned for insufficient address).

citizens. (Again, in 2004 only 66.8% of Indiana's VAP reported being registered, and only 57.3% reported voting. J.A. 177.) But that does not make these burdens "severe."

In fact, such inconveniences differ significantly from burdens members of the Court have found problematic. In *Burdick*, for example, Justice Kennedy criticized the Hobson's choice facing voters: "In effect, a Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices." *Burdick*, 504 U.S. at 444 (Kennedy, J., dissenting). There is no similar Hobson's choice here—only the modest requirement that voters undertake the reasonable effort required to procure identification—which at least 99% already possess. The Voter ID Law also has several fail-safe provisions to help ensure that the poor, elderly, and disabled may vote even without identification. *See* Part III.C.2, *infra*; *cf. Burdick*, 504 U.S. at 445 (Kennedy, J., dissenting, for lack of fail-safe provisions).

A voting regulation cannot be suspect merely because it demands some effort on the part of citizens to exercise the right to vote. *Clingman*, 544 U.S. at 593 ("Many electoral regulations, including voter registration generally, require that voters take some action to participate . . . ."); *Rosario*, 410 U.S. at 760-62. Otherwise, States would be under a continuing burden to deregulate elections, in contravention of the Elections Clause and the superintending duties it implies for States.

5. Petitioners argue that the Voter ID Law imposes a "severe burden" on voting because it "departs from usual and customary regulations adopted elsewhere." Dem.Br. 29; ACLU Br. 45. The Law, however, is novel only in the most hyper-technical, and therefore meaningless, sense.

A national consensus is emerging in favor of *some* form of documentary voter identification. Congress requires it for first-time voters who register by mail. 42 U.S.C. § 15483(b). Twenty-seven States have adopted their own voter-identification requirements. *See* Electionline.org, *Voter ID Laws*. Georgia and Florida reportedly *require* photo identification, and Hawaii,[5] Louisiana, Michigan, and South Dakota *request* photo identification. *Id.* Missouri, too, enacted a photo-identification requirement, only to see it invalidated under state law. *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006). Meanwhile, the bi-partisan Carter-Baker Commission endorsed a photo-identification requirement even more restrictive (by requiring validation within 48 hours) than Indiana's. J.A. 143. Thus, Indiana stands in good company.

Fairly considered, requiring government-issued photo identification at the polls represents nothing more than late application of old technology—a "best practice" for election administration. Government-issued photo identification has been the global standard for documentary identification for decades. The record is replete with examples of other

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[5] As Petitioners note, the website of the State of Hawaii notes that voters must have *photo* identification. ACLU Br. 31.

circumstances—some involving the exercise of constitutional rights—where citizens cannot function on a daily basis without government-issued photo identification. Pet.App. 3 (entering federal courthouses and traveling by airplane); Pet.App. 134 (cashing checks and renting movies); State S.J.Br. Exs. 33-36 (obtaining marriage licenses and entering federal courthouses).

In light of such widespread demands for (and concomitant prevalence of) government-issued photo identification, it is almost shocking that in late 2007 Indiana can be characterized as even *unusual* in requiring it at the polls. Unfortunately, the same political pressures that have preserved other antiquated voting procedures have also stunted electoral application of photo identification. With its Voter ID Law, Indiana has struck a blow for protecting legitimate votes and for modernizing elections. If States are to continue striving for electoral systems worthy of history's most successful republic, such incremental progress should not be maligned and scrutinized for being insufficiently commonplace.

B. There is no discrimination against minorities, Democrats, "non-drivers," urban dwellers, the elderly, the poor, the homeless, the disabled, or anyone else

Petitioners say the Voter ID Law imposes a "severe burden" because it is discriminatory. Dem.Br. 31-41; ACLU Br. 40. They have not even alleged, much less proved, discriminatory purpose of *any* type. In fact, Petitioners have expressly agreed

that the purpose of the Law is to combat fraud. ACLU Br. 9-10, Dem.Br. 6; Pet.App.107. And unlike the invalid ballot-access law that inherently burdened independent voters in *Anderson*, 460 U.S. at 793, the Voter ID Law does not innately encumber any "identifiable political group."

1. The Democrats' expert found no evidence of disparate impact on racial minorities

Petitioners suggest the Law will prove racially discriminatory. Dem.Br. 4, 23-24; ACLU Br. 13, 42. To succeed with this theory, they must allege and prove a racially discriminatory *purpose* along with a disparate effect. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Shaw v. Reno*, 509 U.S. 630, 649 (1993) (requiring proof of racially discriminatory purpose, which can be inferred where no other explanation is available). Yet, Petitioners have never even alleged, much less attempted to prove, that the Voter ID Law intentionally discriminates against racial minorities.

Moreover, Petitioners have never shown that the Law is likely to have a discriminatory effect on minorities. Their own expert, Kimball Brace, acknowledged that he was unable to find any racial impact:

> Q: Did you attempt to establish if there was any racial impact to the passage of the new voter ID law in Indiana?
>
> A: As part of the calculation and part of the

> programming, we did look at the racial data, also.
>
> Q: There was no specific racial category, though, in your report. Why wasn't there?
>
> A: Basically, we could not conclude one way or the other in terms of the distinction in terms of racial categories.

J.A. 279.

Petitioners cite an AARP telephone survey allegedly showing that "members of racial minority groups" are "significantly less likely than the citizenry as a whole to possess current drivers licenses or BMV identification cards." ACLU Br. 13. The survey, however, included only seniors over age 60, so it does not show the prevalence of government-issued photo identification among racial minorities generally. J.A. 31. The survey also does not state the percentage of minorities without identification that are either unlikely to vote or over age 65 (and able to vote absentee without identification). J.A. 30-33. Thus, no evidence in the record suggests any disparate impact on minorities.

Petitioners and *amici* now cite extra-record studies to suggest the Law will have such a racial impact. Dem.Br. 12; ACLU Br. 40-41. These studies, however, do not even suggest, much less establish, such a likely disparate impact. For example, one study found that photo-identification requirements had a negative effect on white, but *not* on black or Hispanic turnout. Timothy Vercellotti & David Anderson, *Protecting the Franchise, or*

Restricting It?: The Effects of Voter Identification Laws on Turnout, Presentation to Am. Political Science Ass'n, at 12 & Tables 6-7 (Sept. 2006) [hereinafter "Vercellotti Study"]. Alvarez and his co-authors found the same. R. Michael Alvarez *et al.*, *The Effect of Voter Identification Laws on Turnout*, at 18-19 (Cal. Inst. of Tech., Social Science Working Paper No. 1267, Oct. 2007) (documenting "a more strongly negative effect on the participation of white, relative to nonwhite voters" and "no evidence that voter identification requirements are racially discriminatory") [hereinafter "Alvarez Study"]; John R. Lott, Jr., *Evidence of Voter Fraud & the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates*, at 12 (Aug. 18, 2006) ("It does not appear that there is anything systematic about being African-American, female or elderly that causes one to be adversely impacted by photo IDs.").

Moreover, the *only* study of the Indiana Voter ID Law—by Professor Jeffrey Milyo—shows no negative disparate minority impact. Among other things, Professor Milyo's study finds that "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties." Milyo Study Abstract, 1, 5-7.

Nor does any of the new evidence credibly support the proposition that minorities in Indiana lack photo identification in disproportionate numbers. A study of one county in Wisconsin, to begin, plainly says nothing about the incidence of photo identification in Indiana, much less about the likelihood that those currently without photo

identification will nonetheless be able to vote, or will even want to vote. ACLU Br. 40, n.19. And the last minute, unreviewed working paper from the Washington Institute for the Study of Race and Ethnicity found *no* statistically significant difference between blacks and whites for accurate, valid identification. Matt A. Barreto, *et al.*, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, at 13, 18 & Table 1.1 (Wash. Inst. for the Study of Ethnicity & Race, Working Paper, Nov. 8, 2007) (finding of nominal 4.3% gap between white and black registered voters is not significant under the "traditional 95%" test) [hereinafter "Barreto Study"].

Finally, the telephone survey by the Brennan Center for Justice purporting to find that 25% of black voting-age citizens lack suitable identification has transparent methodological problems. Brennan Center for Justice, *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship & Photo Identification*, at 3 (Nov. 2006). Its anomalous estimate may well stem from the survey's confusing and leading questions or the decision to "weight[]" the "results of this survey" to "account for underrepresentation of race." *Id.* at 1 n.1. Its key findings, furthermore, may not even be statistically significant given (1) the extremely large margins of error (± 8%), (2) the small sample size, and (3) the absence of any supporting data. *Id.* at 1-3 & n.10. Regardless, the Brennan Center survey says nothing about whether blacks in Indiana are less likely to have government-issued photo identification, much less whether any such "difference" exists among those likely to vote.

Petitioners surely may not justify strict scrutiny with new evidence the State had no opportunity to investigate and challenge. Even if the Court were to take judicial notice of the various extra-record studies, however, the only one relevant—the Milyo Study—refutes Petitioners' disparate-impact theory.

2. The Law is not partisan

As the district court observed, this case from the very beginning has represented "a partisan legislative disagreement that has spilled out of the state house into the courts." Pet.App. 18. In that spirit, the Democrats argue that the General Assembly enacted the Voter ID Law to keep Democrats from voting. Dem.Br. 18-19, 39-40. They cite nothing to support this charge other than the Party's own legislative resistance in the face of overwhelming bipartisan public support for the Law. Dem.Br. 18-19, 39-40; *see also* Mary Beth Schneider, *Voter ID Law Looming for Hoosiers*, Indianapolis Star, April 13, 2005 (reporting that 75% of respondents support requiring photo identification); Fund, *supra*, at 136 (reporting a 2004 survey showing 89% of Bush voters and 75% of Kerry voters supported requiring photo identification at the polls).

If it takes proof of nefarious purpose and effect to justify suspicion of an election law on *racial* discrimination grounds, it takes at least that to make a case based on *political* discrimination. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality) (requiring proof of partisan purpose and effect for political-gerrymandering claims); *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring) (identifying purposeful discrimination as the focal

point). As with their claims of racial discrimination, Petitioners have never even tried to prove partisan discriminatory *purpose*, so this theory, too, must fail.

Nor is there any evidence that the Law will have a disparate negative effect on Democrat turnout. The Milyo Study, in fact, proves the opposite. It states that "[t]he only consistent and frequently statistically significant impact of photo ID in Indiana is to increase voter turnout in counties with a greater percentage of Democrats relative to other counties." Milyo Study Abstract, 1, 7. Even the Barreto Study finds no statistically significant difference between Democrat and Republican voters possessing accurate, valid identification. Barreto Study 8, 15 & Tables 1, 9-10 (nominal 3.9% difference (82.6% to 86.5%) is smaller than the margin of error of ± 3.1% for each).

It is also worth noting that, if the Voter ID Law was intended to benefit Republicans at the expense of Democrats, it has failed miserably. The Republican-controlled Indiana House that passed the Voter ID Law in 2005 returned to Democrat control in 2006 (when the Law was in full force). Similarly, in 2006, Democrats picked up three Indiana congressional seats as well as the Marion County offices of Assessor, Auditor, Clerk of Courts, and Recorder. The Marion County majority vote for Secretary of State, Auditor of State, and Treasurer of State all went from Republican in 2002 to Democrat in 2006. Ind. Sec'y of State, *2002 General Election Registration & Turnout Data*; Ind. Sec'y of State, *2006 General Election Registration & Turnout Data*.

The Voter ID Law is a party-neutral, good-government reform that helps update a generally antiquated election system. The overt partisan opposition of the Democratic Party apparatus—in contrast with its rank-and-file supporters—does not justify *greater* judicial scrutiny or otherwise override the presumption that the Law serves a legitimate purpose. *Cf. Cal. Democratic Party v. Jones*, 530 U.S. 567, 601 (2000) (Stevens, J., dissenting) (giving weight "to the preference of almost 60% of California voters—including a majority of registered Democrats and Republicans—for a blanket primary"); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting) (preferring views of party rank-and-file rather than insiders and officeholders for purposes of inferring a party's position).

3. There is no discrimination against "non-drivers," urban dwellers, or the poor

The Democrats' next candidate for supposed discrimination at the hands of the Voter ID Law is a group whose political prominence has heretofore escaped national attention: non-drivers. Dem.Br. 34. As with all other discrimination theories thrown against the wall in this case, the accusation of discrimination against non-drivers is a non-starter.

First, it bears observing that, in 1993, a Democrat-controlled Congress enacted Motor-Voter, and a Democrat President signed it. 42 U.S.C. § 1973gg *et seq*. It is disingenuous for Democrats now to argue that utilizing license branches to modernize election procedures discriminates against the poor

and uneducated, the very groups Motor-Voter targeted. 42 U.S.C. § 1973gg(a)(3); *see also* Monique L. Dixon, *Minority Disenfranchisement During the 2000 General Election: A Blast From the Past or a Blueprint for Reform*, 11 Temp. Pol. & Civ. Rts. L. Rev. 311, 316 (2002).

Regardless, the Democrats cite no history of discrimination against non-drivers (which might at least have supplied a plausible plotline), no proof of intent to discriminate against them, and no data showing that non-drivers (1) will be unable to vote because they lack any acceptable form of identification and cannot vote absentee; (2) are otherwise a significant segment of participating voters; and (3) are likely to vote against Republicans.

Moreover, the Voter ID Law affirmatively *accommodates* non-drivers. By law, the BMV must issue non-license identification cards *free* to those needing them to vote. Ind. Code § 9-24-16-10(b). Drivers, on the other hand, must pay a fee of $19.50 for a standard five-year operator's license. *See* Ind. BMV, *Driver Services Fees—Operator License*. It is an odd sort of discrimination that cuts the putative victims a monetary break over their supposedly preferred counterparts.

Petitioners also argue that the Voter ID Law discriminates against "persons who live in urban areas" and citizens in low-income brackets. ACLU Br. 13, 40-41; Dem.Br. 34-35. However, the Democrats' expert witness presented data showing that only a small percentage of Marion County's VAP lacks photo identification, Pet.App. 69-70 & n.42, and he presented *no* reliable data showing the

percentage lacking identification who are registered to vote. Pet.App. 61-63, 69-70. Furthermore, Marion County "has a metro bus system and multiple BMV branch locations thereby greatly facilitating the ability of these affected individuals to obtain the necessary photo identification." Pet.App. 70.

The Democrats cite voter turnout in Marion County vis-à-vis the rest of the State in 2006 versus 2002 as evidence of anti-urban bias, though they fully acknowledge that "there may be other explanations" besides the Voter ID Law for lower turnout. Dem.Br. 35. "Other explanations" are far more likely. Comparing 2006 to 2002 in Lake County—a highly urban area near Chicago—shows that absolute voter turnout increased by 11% and the turnout rate relative to the state improved by 6%. Ind. Sec'y of State, *2002 General Election Registration & Turnout Data*; Ind. Sec'y of State, *2006 General Election Registration & Turnout Data.*

With respect to income, the evidence debunks any allegation of disparate burden on the poor. The district court observed that "Brace's report, to the extent it is accurate, actually indicates that voters without photo identification are *not* significantly more likely to come from low income segments of society." Pet.App. 72 (emphasis added). This is because "under any of Brace's criteria, between 61% and 65% of his unmatched voters live in census blocks with median incomes above $35,000, which roughly corresponds to the 63.9% of the voting age population he lists as residing in those areas." Pet.App. 72. Even the eleventh-hour Barreto Study shows no wealth-based disparities. Barreto Study 21

& Fig. 3 (showing voters with income over $80,000 are 4.3% *less* likely to possess photo identification than those between $40,000 and $80,000, and no statistically significant difference between those earning under $40,000 (78.9%) and those earning over $80,000 (83%)).

In addition, Indiana's indigency exception ameliorates any voting-related burden on the poor caused by lack of identification. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c). Again, the Milyo Study shows that in Indiana counties with greater percentages of elderly, uneducated, poor, or minority voters, turnout *increased* in 2006. Milyo Study Abstract, 1, 5-7. Indeed, all but one of the studies on voter turnout have found no disparate impact on low-income groups. Vercellotti Study 13 ("There were no significant differences in terms of . . . income.").

The Democrats point to the only study that purportedly reaches a different conclusion. Dem.Br. 34-35 (citing Alvarez Study). But that Study found only that low-income voters are less likely to vote in States requiring photo identification than in States "that simply require the voter [to] provide their name." Alvarez Study 19. It identified *no* decline in low-income voter turnout in States requiring photo identification compared with States using *signature-match* requirements. *Id.* at 19, 22. That is particularly significant because before the Voter ID Law, Indiana was a signature-match State, not a "state your name" State. Ind. Code § 3-11-8-25(a) (2005) (repealed 2006). Furthermore, the Alvarez Study does not account for the impact of the Law's indigency exception, and any income-group disparate impact may only reflect legitimate fraud deterrence.

4. The Law *accommodates* elderly and disabled voters

The final illusory categories of supposed Republican discrimination against political foes are the elderly and disabled. Dem.Br. 34; ACLU Br. 13. The elderly, however, are hardly an identifiable Democratic constituency. For example, President Bush received 52% of the vote of those over age 65 in 2004. Amicus Br. of Historians & Other Scholars 29 n.66.

In any event, the Voter ID Law affirmatively accommodates seniors and the disabled. It does not apply to voting absentee by mail, which means that the disabled and seniors over 65 (who are automatically entitled to vote absentee) face no ill effects from the Law even if they have no photo identification. Ind. Code § 3-11-10-24. In addition, residents of state licensed-care facilities who vote at polling places within those facilities need not present photo identification. Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1(e). This accommodates the very small subset of elderly voters who cannot travel to obtain photo identification, but also who do not need to travel to vote at the polls.

Furthermore, no studies have found disparate negative impact on elderly voter turnout. Vercellotti Study 13; Alvarez Study 19. In Indiana specifically, counties with larger elderly populations saw no statistically significant change in voter turnout after the Voter ID Law. Milyo Study 12-13.

Petitioners nonetheless attempt to show a likely disparate negative impact on seniors by citing the

same AARP telephone survey. ACLU Br. 13. That survey shows *97%* of seniors have state-issued photo identification, an astonishingly high figure for a group supposedly targeted for systematic disenfranchisement. J.A. 33 n.3. Beyond that, the study does not disclose whether any of the remaining 3% are likely to vote or are at least 65 (or under 65 but disabled). Without providing such data—and without disclosing details of the representativeness of its sample—the AARP survey cannot suggest that the Voter ID Law will disproportionately burden seniors.

C. The Voter ID Law has nothing in common with poll taxes

Petitioners urge strict review by comparing the Voter ID Law to poll taxes. ACLU Br. 36; Dem.Br. 31-32. They argue that any law requiring a voter to have a document constitutes a poll tax. ACLU Br. 36; Dem.Br. 31-32. But if that were true, voter registration, which provides voters with documentary proof of registered status, would constitute a poll tax, as would HAVA's own voter-identification requirements. 42 U.S.C. §§ 15483(a)(5), 15483(b); *cf. Clingman*, 544 U.S. at 591 ("In Oklahoma, registered members of the Republican, Democratic, and Reform Parties who wish to vote in the LPO primary simply need to *file a form* with the county election board secretary to change their registration.") (emphasis added).

The Court invalidated poll taxes as a condition of voting because of the racially discriminatory history behind such taxes and because "[v]oter qualifications have no relation to wealth nor to paying or not

paying this or any other tax." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). It later invalidated a law conditioning the federal franchise on either paying a poll tax or certifying residence. *Harman v. Forssennius*, 380 U.S. 528, 541 (1965). Critically, payment of a per capita tax lay at the root of the problem. *Id.*

In contrast, proper identification plainly bears a legitimate relationship to voting, and the Voter ID Law imposes no tax and carries no history suggesting racial discrimination. Non-license identification is free to voters, and fees for birth certificates (which have existed since 1907) are merely for the service, not a general exaction. State S.J.Br. Exs. 48-49; Dem. S.J.Br. Ex. 7. Indigents needing to pay a fee for a birth certificate to get identification are exempt from the Voter ID Law. Ind. Code § 3-11.7-5-2.5(c).

As a functional matter, moreover, the vast majority of voters are not suddenly required to pay a fee to the State for the privilege of voting. *Harper*, 383 U.S. at 666-68. Again, 99% already have conforming photo identification in the form of a driver's license or non-license photo-identification card. Many of the remaining 1% who wish to vote will be able to vote absentee without photo identification, or else procure identification from the *federal* government or a birth certificate from *another* State, and in all events need pay any fee only *once*. In contrast, the Virginia poll taxes invalidated in *Harper* and *Harman* were assessed against *all voters* in *every election*. *Harper*, 383 U.S. at 668; *Harman*, 380 U.S. at 541. If the Voter ID

Law is meant to condition voting on payment of a fee to the State, it is remarkably inept legislation.

III. The Voter ID Law Is an Eminently Reasonable Effort to Combat In-Person Voter Fraud, Which Has Always Existed Across the Country

The Voter ID Law serves two purposes. First and foremost, it helps with deterring and detecting in-person voter fraud, a long-recognized compelling interest of the State. *Marston v. Lewis*, 410 U.S. 679, 681 (1973). Second, it helps safeguard voter confidence in the legitimacy of election results, an interest the Court has repeatedly deemed compelling. Further, the means to vindicate these interests is so well tailored that the Voter ID Law stands up to any level of scrutiny.

A. Nearly all voting regulations are premised on the need to prevent fraud, and proof of recent fraud is not necessary to keep them

Indiana does not need to prove prior voter impersonation to justify preventing it from happening. As the Court has made quite clear, the Constitution does not "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Rather, "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does

not significantly impinge on constitutionally protected rights." *Id.*

A contrary rule would jeopardize registration, in-person voting, voter list maintenance, and signature matches, all of which target dishonest voting, and all of which have some less "burdensome" alternative. Under Petitioners' theory, States may not take commonsense fraud-prevention measures without proving prior abuses of less secure, less burdensome alternatives. The Constitution does not so confine efforts to preserve and protect honest voting, particularly because the Elections Clause expressly vests *Congress* with responsibility for correcting States' overreaching.

1. Proof of fraud is not required to prevent fraud

Petitioners rely on cases invalidating substantive speech limits for the proposition that the State is required to prove the existence of rampant fraud before enacting a law to prevent fraud. ACLU Br. 49-51 & n.29; Dem.Br. 44. For starters, however, if the State's *prima facie* interest in fraud prevention can justify voter-identification laws only to the extent it can justify political-advocacy and solicitation restrictions, States could not even require voters to disclose their names. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invaliding anonymous-leafleting law).

The Voter ID Law is different because it does not regulate speech based on constitutionally protected content. Instead, it deters, on speech-neutral grounds, voter impersonation, which no one argues

is constitutionally protected. *Id.* at 344-46 (distinguishing lower scrutiny applied in *Storer* and *Anderson* because Ohio's anonymous-leafleting law was not a speech-neutral control of the mechanics of the election process). The Voter ID law enhances the integrity of elections and is entitled to greater deference than speech regulations because it affirmatively protects constitutional rights, just as the Constitution itself contemplates *should* happen.

On their own terms, moreover, many of the free-speech cases cited by Petitioners turn not on the State's failure to prove the existence of fraud or corruption, but on the lack of fit between the laws at issue and the menace to be prevented. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164-69 (2002); *Republican Party of Minn. v. White*, 536 U.S. 765, 776-77 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203-04 (1999); *McIntyre*, 514 U.S. at 349-53; *Edenfield v. Fane*, 507 U.S. 761, 767-69, 771-73 (1993); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-501 (1985); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 635-39 (1980).

In addition, even with respect to free-speech regulations, the Court has been clear that highly plausible justifications need not be proved. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("[T]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). The Court has required proof of need only in response to a

facially implausible justification, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231-32 (2003) (invalidating ban on contributions by minors), or in light of evidence concretely demonstrating harm to constitutional rights disproportionate to any apparent benefit, *Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479, 2496-2500 (2006) (invalidating contribution limits proven to be debilitating to parties and volunteers as well as candidates). Neither circumstance exists here.

The notion that elections need protection from fraud is hardly novel or debatable. *See* Part III.A.2., *infra*. The argument here is over how best to police a threat that everyone agrees exists. Where a regulation has such a plain connection to protecting the integrity of elections and guaranteeing the rights of legitimate voters, the government has no burden to prove any particular level of need. *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

2. History demonstrates that as society grows, more fraud-prevention measures are necessary

All significant voting regulations target fraud. For example, the Australian ballot—the secret, uniform, government-printed ballot known to American voters today—came into common usage in the United States in 1888 in response to rampant fraud. Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harv. J. on Legis. 167, 172-73 (1991). Before

that, voters cast color-coded ballots distributed by political parties, which enabled party bosses to observe whether individual voters had voted correctly. *Id*; *Burdick*, 504 U.S. at 446 (Kennedy, J., dissenting). The widespread adoption of voter-registration laws occurred in response to concerns that individuals would vote multiple times and vote in the names "of persons who had moved away or died, of persons not qualified to vote, of fictitious names, sometimes from fictitious addresses." Joseph P. Harris, *Registration of Voters in the United States* 5 (1929).

As American society has grown and changed, the need for election anti-fraud laws has only increased. Poll workers no longer know their neighbors and are under great pressure to keep lines moving to avoid deterring impatient voters. The need for better, yet still reasonable, fraud-prevention measures is self-evident. Computerized voting, electronic scanners, electronic poll books with signature exemplars for each voter, provisional ballots—each of these incremental advancements proceeds from the notion that modern society needs more secure elections.

There has never been a demand, however, that government prove some minimal quantum of fraud to take the next, reasonable step toward greater election security. If so, then proof would be necessary to sustain voter-registration laws and the Australian ballot, both of which impede some voters from casting votes as they wish. *Burdick*, 504 U.S. at 446 (Kennedy, J., dissenting). There is no defensible constitutional theory that existing security measures, whatever they may be, are

automatically permissible, but anything additional must be justified with proof of need in federal court.

B. The Indiana legislature had ample bases for enacting a new, more effective means of preventing in-person vote fraud

Even if the State must prove the need for the Voter ID Law, there is plenty of evidence from Indiana and across the country to justify it.

1. There is national evidence of in-person fraud, and Indiana has a troubling recent history of vote fraud generally

As the Seventh Circuit observed, the nature of in-person election fraud is such that it is nearly impossible to detect or investigate. Pet.App. 7-8. Without a photo-identification requirement, unless a voter stumbles across an impostor trying to use her identity, or an over-burdened poll worker happens to notice a deviation between signatures, officials will not detect in-person voter fraud. Pet.App. 7-8; J.A. 188-89. Yet, as the Carter-Baker Commission observed, "there is no doubt that it occurs," and no doubt that it dilutes the strength of legitimate votes and thereby disenfranchises honest voters. J.A. 138.

As recounted in the Statement, in recent years, Indiana has seen many cases of voter fraud of various types. Even if the Voter ID Law would not have prevented these particular instances of election fraud, the Indiana General Assembly had reason to worry that a culture of election fraud was spreading.

An appropriate response was to make elections more secure in many ways, such as by tightening restrictions on absentee voting and requiring photo identification at the polls.

In addition, the State is entitled to rely on the experiences of other jurisdictions when deciding issues of public policy, even when constitutionally protected rights are at stake. *Munro*, 479 U.S. at 195-96. There is ample evidence from across the nation that in-person vote fraud exists in contemporary society. Instances of deceased voters, double voters, and voters using fake names and addresses are all too common in American elections. State S.J.Br. Ex. 3 at 18-24; Ex. 4 at 2-7. Even Congress is convinced it happens. 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) ("By passage of this legislation, Congress has made a statement that vote fraud exists in this country.").

Moreover, a legislative decision to rely on such reports is not subject to judicial second-guessing. These are matters for legislative factual determination, not adjudication using minimum-proof standards. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *see also Nixon*, 528 U.S. at 402 (Breyer, J., concurring) ("[I]n the field of election regulation, the Court in practice defers to empirical legislative judgments . . . .").

2. Inflated voter-registration lists make Indiana particularly vulnerable to in-person vote fraud

Voter impersonation is a particularly acute concern in Indiana because the State's voter-

registration lists suffer inflation exceeding 40%, among the highest in the country. J.A. 177-78, 184. This presents a situation ripe for fraud that the State is entitled to prevent. Pet.App. 8-9, 109. The Petitioners argue that, rather than require photo identification to deter individuals from co-opting invalid registrations, the State should just do a better job maintaining voter-registration lists. Dem.Br. 52-53; ACLU Br. 57. This argument, however, both contravenes the Democrats' entire theory of the case and ignores the realistic limits of list-maintenance efforts.

a. To begin, the Democrats do not explain why the State has any better justification for purging voter lists than it does for requiring voters to present photo identification. Under the Democrats' theory, any election regulation predicated on deterring fraud that may have a disenfranchising effect on some voters is invalid unless the State proves actual occurrences of the type of fraud it seeks to prevent. Dem.Br. 42-45. Particularly in the wake of Motor-Voter, which curbed States' voter-list-maintenance efforts *precisely* over concerns about disenfranchising legitimate voters, there is little doubt that *any* list-maintenance efforts will potentially purge some legitimate voters. Accordingly, under the Democrats' theory, without documenting actual instances where impostors have used invalid registrations to vote, the State could not undertake even the voter-list maintenance efforts required by Motor-Voter.

Indeed, according to the Democrats' standards, the State's burden for purging registration lists should be all the greater because such efforts likely

pose disproportionate risks for minority and poor voters. Under Motor-Voter, whether a registration may be cancelled depends on whether a voter associated with that record actually votes. 42 U.S.C. § 1973gg-6(d). Minorities and the poor tend to vote in disproportionately smaller numbers, so it follows that even valid records for minority and poor voters likely will be cancelled in disproportionately larger numbers. S. Rep. No. 103-6 (1993), *available at* 1993 WL 54278, at *17-18 ("[M]any persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.").

Thus, ultimately, the Democrats do not advance a coherent constitutional theory, and certainly not one that would permit *any* efforts to protect legitimate voters from Indiana's inflated voter lists—at least not without proof of prior fraud. The Court has already rejected putting States in that position. *Munro*, 479 U.S. at 195-96; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.").

b. In addition, because of the need to avoid cancelling scads of valid, if dormant, registrations, list-maintenance efforts, even under the Consent Decree, do not offer a complete solution to list inflation. While efforts pursuant to the Consent Decree have resulted in more than 100,000 duplicate and decedent registration cancellations, this is a highly limited impact given the estimated 1.3 million invalid registrations. J.A. 177-78. None of the

remaining "inactive" registrations can be removed until after the November 2008 general election—and only then if (1) they are not used to vote in the meantime, and (2) local officials choose to remove them. And as the Seventh Circuit observed, even if the Consent Decree leads to substantial improvements, Indiana's voter-registration lists are only likely to become inflated again over time. Pet.App. 9.

Far from being "rectified," Dem.Br. 53, Indiana's inflated voter lists are likely to remain a problem into the future. The Voter ID Law remains necessary to prevent in-person fraud facilitated by existing and future list inflation.

3. The need to preserve public confidence in elections justifies the Voter ID Law

The Court has repeatedly confirmed that States have a compelling interest in protecting public confidence in the integrity and legitimacy of representative government. States have wide latitude to enact measures reasonably targeting the *perception* of corrupt elections. As the Court unanimously acknowledged in *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7 (2006), "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."

This interest is sufficient to justify substantial content-based impingements on political speech of federal-government employees. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973) ("[C]onfidence in the system of representative Government is not to be eroded to a disastrous extent."). And it justifies limiting large contributions to political campaigns. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (invoking "public awareness *of the opportunities for abuse* inherent in a regime of large individual financial contributions") (emphasis added); *see also McConnell*, 540 U.S. at 143 ("Of 'almost equal' importance has been the Government's interest in combating the appearance or perception of corruption . . ."); *Nat'l Right to Work Comm.*, 459 U.S. at 208 (acknowledging "the importance of preventing . . . the eroding of public confidence in the electoral process through the appearance of corruption").

Here, even more than in the political-campaign context, government is right to worry that confidence in the legitimacy of elections may erode based solely on "public awareness of the opportunities for abuse." *Buckley*, 424 U.S. at 27. Such opportunities are transparently obvious in elections without identification checks, particularly where there is high voter-list inflation. Regardless whether particular instances of fraud are well documented, "common sense," *McConnell*, 540 U.S. at 145, tells us that the General Assembly is entitled to be concerned that the combination of inflated voter rolls, lax security, and closely contested elections may erode voter confidence in election results.

In 2000, a Rasmussen poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. State S.J.Br. Ex. 22. A later Gallup Poll showed that 67% of adults nationally had only "some" or "very little" confidence in the way votes are cast. State S.J.Br. Ex. 23, at 8-9. Professor Hasen cites data showing that, since 2000, "a growing party and racial divide in public confidence in the fairness of the electoral process has emerged." Amicus Br. of Professor Hasen 10. Hasen has testified before Congress that more than 25% of Americans worried that the 2004 presidential vote was unfair. State S.J.Br. Ex. 24, at 1; *cf. Nixon*, 528 U.S. at 394 (noting that overwhelming public support can "attest[] to the perception" of the need to combat "'corruption and the appearance thereof'").

Public surveys and actions by at least half of the States and Congress to require *some* form of voter identification show an extraordinary consensus concerning the need for greater election security. Without it, the public may question the legitimacy of elections—close elections in particular. This is another compelling justification for the Indiana Voter ID Law.

C. Requiring identification already possessed by 99% of Indiana's VAP is the embodiment of "reasonable"

When it adopted the Voter ID Law, the Indiana General Assembly incorporated a simple, ordinary, dependable device that society has long accepted and adopted: government-issued photo identification already possessed by 99% of Indiana's VAP. This is a hallmark of reasonableness and narrow tailoring.

1. The General Assembly reasonably balanced cost, prevalence, and security

Photo identification is already required for many routine activities, such as flying, driving, cashing a check, staying in a hotel, purchasing alcohol, and renting a video. Pet.App. 3, 134; State S.J.Br. Exs. 31, 33-36. Even exercising some fundamental constitutional rights, such as getting married or entering courthouses, often requires photo identification. State S.J.Br. Exs. 33-36. In 2004, when Congress was debating whether to adopt a federal photo-identification standard, it recognized not only how the driver's license has become the "foundation of your identity," but also how "[t]he driver's license has come to represent more than authorization to operate a motor vehicle; it imparts a stamp of legitimacy and is often taken as unquestionable proof of identity." 150 Cong. Rec. H8664-02 (Oct. 7, 2004).

It is also a useful, uncomplicated tool for identifying individual voters. Prior election-security measures included a process for challenging voters and a signature-match requirement. J.A. 187-88. As the State's expert testified, however, the challenge procedure was typically used to verify residency, not identity, and the signature comparison required unrealistic poll-worker expertise and care. J.A. 187-88. Photo identification permits poll workers to check quickly the name on the list against the name on the card, and the face on the card with the face of the voter. J.A. 188.

Among all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity. The judiciary is ill-equipped to second-guess whether less secure forms of identification, such as utility bills and bank statements, would suffice. Congress and other States may have struck different balances, but the Indiana General Assembly is entitled to make its own legislative determinations in this regard.

2. The Voter ID Law includes reasonable safeguards to protect legitimate voters without identification

As mentioned, the Voter ID Law is structured in sensible ways (free identification, no application to absentee voters, accommodations for indigents and religious objectors) to minimize the risk of deterring legitimate voters without creating administrative problems or sacrificing election integrity. Beyond the specific exceptions noted, the Voter ID Law is reasonably drafted to prevent unwarranted disenfranchisement.

a. Voters who arrive at the polls without photo identification may cast provisional ballots and validate them within 10 days by presenting identification to the county clerk. Ind. Code § 3-11-8-25.2. If the ballot is rejected, the voter may initiate judicial review proceedings, with subsequent appeals available, to address fact disputes and statutory interpretation issues. Ind. Code § 3-6-5-34. Petitioners claim these safeguards are not enough, but their objections suggest nothing so much as

reflexive determination to oppose the Law at all turns.

The provisional-ballot validation process for indigents and religious objectors requires nothing more of the voter than to sign an affidavit at the county clerk's office within 10 days of an election. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c). It falls in line with the process for validating provisional ballots cast for other reasons, including uncertainty about precinct assignment or forgetting to bring identification. Requiring indigents and religious objectors to follow the same process only makes sense as a matter of ensuring smooth election administration.

More specifically, keeping poll workers out of the business of validating provisional ballots prevents delays at the polls. If election workers—a scarce resource in any election—must attend to the details of validating provisional ballots, voters may have to wait longer to vote. Nothing deters voting so much as long lines at the polls. Amicus Br. of Current & Former Sec'ys of State 22. Requiring indigents and religious objectors to validate their ballots at the clerk's office benefits the electorate as a whole.

Moreover, there is a way for indigents and religious objectors to make only *one* trip to vote. While the provisional-ballot law requires validation at the county clerk's office, it does not require validation *after* election day. Ind. Code § 3-11.7-5-2.5. This is important because in every Indiana county, all registered voters may cast their ballots at the county clerk's office starting 29 days prior to election day until noon the day prior to election day.

Ind. Code § 3-11-10-26(c). Photo identification is required, but indigents and religious objectors may, by voting early, cast a provisional ballot at the clerk's office and then validate it on the same trip to the same office by signing the appropriate affidavit. Here again, the Law accommodates those who may find compliance difficult.

b. Petitioners also discount the suitability of absentee voting as an alternative for seniors and individuals with disabilities. Absentee voting, they contend, is not a reasonable accommodation because (1) applying for an absentee ballot is itself burdensome; (2) absentee ballots may not arrive at the county election board by the deadline; and (3) absentee voters may miss influential events in the final days of a campaign. Dem.Br. 5-6.

Petitioners' complaints over the minutiae of voting absentee prove only that *all* voting systems burden voters. True, voters must apply for absentee ballots, but they can obtain applications via mail, telephone, fax, and internet. Ind. Code § 3-11-4-4; Ind. Sec'y of State, *Application for Absentee Ballot*. As for conveying one's ballot to the election board on time, Petitioners supply no evidence that this is a real problem. Those voting absentee by virtue of age or disability often will mail their ballots within their counties of residence, so delivery is unlikely to take more than a few days. Accordingly, such voters need not miss any significant phases of a campaign likely to change their minds.

Voting absentee is a reasonable accommodation likely to blunt any alleged disparate impact the Voter ID Law might have on the elderly and

disabled. *See* Milyo Study 1, 12-13 (documenting no statistically significant downturn in counties with larger populations of seniors). Besides, "[s]urely, at some point, the important interest of the State in protecting its entire electoral system outweighs a minor and incidental burden that happens to fall on a few uniquely situated citizens." *Kusper v. Pontikes*, 414 U.S. 51, 63-64 (1973) (Blackmun, J., dissenting).

c. Finally, the Voter ID Law is itself a safeguard against improper interference with voting rights. Before enactment of the Law, partisans stationed at polling places could challenge voters based only on suspicions about identity. Ind. Code § 3-11-8-27. Such challenges have prompted concerns about voter intimidation. ACLU S.J.Br. Ex. 14, at ¶¶ 6-10; Ex. 16, at 60-67. Under the Voter ID Law, all voters must carry photo identification that provides objective, on-the-spot confirmation of their right to vote that immediately refutes bad-faith challenges based on vaguely articulated suspicions. The system does not rely on partisan poll workers to vouch for their friends while leaving outsiders to fend for themselves—it treats all voters equally. In Indiana, even members of Congress must show proper identification to vote.

3. Indiana has acted to prevent absentee-ballot fraud with rules better targeted at that particular problem.

Petitioners insist the State is not truly interested in preventing voter fraud because the Law does not apply to mail-in absentee ballots. Dem.Br. 43-44;

ACLU Br. 47. First, it is false to say that Indiana has not addressed absentee-ballot fraud in recent years. The same year it enacted the Voter ID Law, the General Assembly limited absentee voting to those prevented from voting for the *entirety* of election day (in addition to those categorically entitled to vote absentee, such as the elderly and the disabled). Ind. Code § 3-11-10-24(a). Accordingly, the vast majority of voters are routed away from fraud-prone absentee balloting and toward in-person voting. The General Assembly also tightened restrictions on *handling* absentee ballots. Ind. Code § 3-11-10-24(c)-(d). This is important because much absentee-ballot fraud occurs when political bosses deliver ballots, "help" the voters, and then return them to the clerk's office. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004).

As to the objection that the Voter ID Law does not apply to absentee voting, the answer is that it would not prevent mail-in absentee-ballot fraud, which typically occurs in a way not reasonably detectable by checking photo identification. Requiring voters to enclose a photocopy of photo identification plainly would not reveal the chief mode of absentee-ballot fraud: coercion of legitimate voters. *Id.* Photo identification would also be of little use in preventing voter impersonation. Pet.App.9-10. Obviously, the absence of a live body standing before election officials precludes linking the enclosed identification with the person actually casting the ballot. Pet.App. 10; J.A. 189-91.

Furthermore, while signature comparison yields little benefit at the polling place, it is very useful for absentee-ballot security. Officials have much more

time to compare signatures on ballot envelopes with signatures on voter-registration and absentee-ballot applications. J.A. 189-91. The difference in outcomes is significant. Witnesses with decades of combined experience working polling sites recall *no* instances where a signature was challenged at the polls. ACLU S.J.Br. Ex. 13, at 18; Ex. 17. at 25; J.A. 188. In contrast, a former Marion County election administrator has said that election officials routinely reject absentee ballots on suspicion of forgery. J.A. 190.

Absentee-ballot fraud self-evidently poses different problems than in-person fraud. The General Assembly is entitled to address those problems differently, if at all. *Bush v. Gore*, 531 U.S. 98, 143 (2000) (Ginsburg, J., dissenting) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969), for the proposition that "even in the context of the right to vote, the State is permitted to reform 'one step at a time'").

* * * *

Particularly given the expectations of modern society with respect to the need for photo identification generally, the Indiana Voter ID Law is a wholly unremarkable and overdue election-security regulation. If there is a case to be made that the Law goes too far by degrees, Congress can supersede Indiana using its Elections Clause authority, as Motor-Voter did with voter registration (which Congress made easier) and voter-record cancellation (which Congress made harder). Congress has enacted its own voter-identification law with HAVA, but it has conspicuously chosen *not* to override state

laws requiring photo identification. It follows that the Court should itself forbear and allow Indiana to exercise primary responsibility for regulating state and federal elections—accounting for "change in the situation" of the State—as the Founders envisioned.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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